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AD

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Cynthia Badinger

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Serial No. 78238042

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Seth M. Nehrbass of Garvey, Smith, Nehrbass & Doody, L.L.C.  
for Cynthia Badinger.

Verna Beth Ririe, Trademark Examining Attorney, Law Office  
105 (Thomas G. Howell, Managing Attorney).

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Before Seeherman, Quinn, and Drost, Administrative  
Trademark Judges.

Opinion by Drost, Administrative Trademark Judge:

On April 15, 2003, Cynthia Badinger (applicant) filed  
an intent-to-use application (Serial No. 78238042) to  
register the mark CAJUN MARTINI, in typed form, on the  
Principal Register for goods ultimately identified as  
"prepared alcoholic cocktail" in Class 33. The examining  
attorney refused registration on the ground that the mark  
was merely descriptive under Section 2(e)(1) of the

Trademark Act, 15 U.S.C. § 1052(e)(1), of the goods because "the proposed mark merely describes a martini cocktail prepared using hot [C]ajun seasonings." First Office Action at 2. Applicant, on the other hand, argues that other marks containing the word "Cajun" have registered on the Principal Register.

"A mark is merely descriptive if it 'consist[s] merely of words descriptive of the qualities, ingredients or characteristics of' the goods or services related to the mark." In re Oppendahl & Larson LLP, 373 F.3d 1171, 71 USPQ2d 1370, 1371 (Fed. Cir. 2004), quoting, Estate of P.D. Beckwith, Inc. v. Commissioner, 252 U.S. 538, 543 (1920). See also In re MBNA America Bank N.A., 340 F.3d 1328, 67 USPQ2d 1778, 1780 (Fed. Cir. 2003); In re Quik-Print Copy Shops, Inc., 616 F.2d 523, 205 USPQ 505, 507 (CCPA 1980). "Such qualities or properties include color, odor, function, dimensions, or ingredients." In re Gyulay, 820 F.2d 1216, 3 USPQ2d 1009, 1010 (Fed. Cir. 1987) (internal quotation marks omitted). Descriptiveness of a mark is not considered in the abstract, but in relation to the particular goods or services for which registration is sought. In re Abcor Dev. Corp., 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978). Moreover, we must consider whether

the mark in its entirety is merely descriptive. P.D. Beckwith, Inc., 252 U.S. at 545-46.

We now look at the record to determine if applicant's mark is merely descriptive. "The perception of the relevant purchasing public sets the standard for determining descriptiveness. Any competent source suffices to show the relevant purchasing public's understanding of a contested term or phrase." In re Nett Designs Inc., 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) (citation omitted). The examining attorney relies on several pieces of evidence. First, the examining attorney included dictionary definitions of "Cajun"<sup>1</sup> and "martini."<sup>2</sup> Second, the examining attorney introduced four registrations containing the term "Cajun," upon which both the examining attorney and applicant rely and which will be discussed subsequently. Third, the examining attorney provided several Internet printouts from various sites that show use of the term "Cajun Martini."

Cajun Martini

Ingredients:

- 2 parts Stolli Vodka
- 1 part Vermouth

Mixing instructions:

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<sup>1</sup> "Of, relating to, or prepared in a style of cooking originating among the Cajuns and characterized by the use of hot seasonings (as cayenne pepper)." *Merriam-Webster Dictionary*.

<sup>2</sup> "A cocktail made of gin and dry vermouth, also: VODKA MARTINI." *Merriam-Webster Dictionary*.

Garnish with jalapeno pepper  
[www.webtender.com](http://www.webtender.com)

Cajun Martini  
Ingredients

- 3 oz. pepper vodka
  - dash dry vermouth
  - jalapeno stuffed olive
- [frenchfood.about.com/library/blcajunmartini.htm](http://frenchfood.about.com/library/blcajunmartini.htm).

#### CAJUN MARTINI

... The Cajun Martini remains a favorite in New Orleans, especially at K-Paul's Louisiana Kitchen, where it is said to have been created by Chef Paul Prudhomme and his wife, Kay. This can be made with commercially-prepared pepper vodka, or you can prepare your own spicy vodka or gin. To do so, carefully wash 3 fresh cayenne peppers...  
[Margaritaville.com](http://Margaritaville.com).

#### CAJUN MARTINI

1¼ oz. Peppar  
Dash Extra Dry Vermouth  
[Recipes.bartender.com](http://Recipes.bartender.com)

Cajun Martini

3 ounces Pepper Vodka  
1 dash Dry Vermouth  
Stir over cracked ice and strain into a chilled cocktail glass. Garnish with an olive stuffed with jalapeno pepper  
[www.drinkstreet.com](http://www.drinkstreet.com).

Cajun Martini

LIQUORS	MIXERS
1 Dash - Dry Vermouth	½ oz. - Jalapeno Pepper Juice
1 Dash - Sweet Vermouth	1 - Jalapeno Pepper
1¼ oz - Gin	

[www.bumpkinland.com/Drink-o-Matic/showdrink](http://www.bumpkinland.com/Drink-o-Matic/showdrink)

Cajun Martini

This Drink, plus over 300 other mixed drink cocktail recipes on the Martini Cheat Sheet...  
[www.cheatsheetpublishing.com/martinicheatsheet](http://www.cheatsheetpublishing.com/martinicheatsheet)

Cajun Martini

3 oz pepper vodka

1 dash dry vermouth  
Garnish:  
Jalapeno stuffed olive  
[iBoozer.com](http://iBoozer.com)

Martinis, martini drink recipes...  
Bronx Martini  
Cajun Martini  
Caribbean Martini  
[www.drinksmixer.com](http://www.drinksmixer.com)

This evidence supports the examining attorney's conclusion that the term CAJUN MARTINI merely describes a martini with a pepper flavor achieved through the use of a pepper liquor, a pepper sauce, or an actual pepper such as a jalapeno slice or a jalapeno stuffed olive. Inasmuch as applicant's prepared alcoholic cocktails could include similarly prepared martinis with a pepper flavor, the term CAJUN MARTINI is merely descriptive of these cocktails.<sup>3</sup>

Both the examining attorney and applicant refer to four registrations to support their positions. These registrations are:

Registration No. 1,986,542  
CAJUN EGGNOG  
Prepared alcoholic cocktails  
Section 2(f); "Eggnog" disclaimed

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<sup>3</sup> Applicant responds to this evidence (Brief at 3) by pointing out that "all of the websites are copyrighted as "2004 Microsoft Corporation" which is a date subsequent to the filing date" of its application. However, we note that several sites clearly indicate an early copyright date for the content of the site. See [recipes.bartender.com](http://recipes.bartender.com) (© 1995-2003 Foley Publishing Corporation); [www.bumpkinland.com/Drink-o-Matic](http://www.bumpkinland.com/Drink-o-Matic) (All content © 1999 Bland Software).

Registration No. 1,502,406  
CAJUN MARY  
Non-alcoholic cocktail mix, namely bloody Mary  
"Cajun" disclaimed

Registration No. 1,527,251  
BERTRAND'S CAJUN SPECIALTIES  
Non-alcoholic cocktail mix  
"Cajun Specialties" disclaimed<sup>4</sup>

The examining attorney refers to the registrations as evidence that the term "Cajun" "is recognized as descriptive." Final Office Action at 2. Third-party registrations can be used as in the manner of a dictionary definition to illustrate how the term is perceived in the trade or industry. "Such third party registrations show the sense in which the word is used in ordinary parlance and may show that a particular term has descriptive significance as applied to certain goods or services."

Institut National Des Appellations D'Origine v. Vintners International Company, 958 F.2d 1574, 22 USPQ2d 1190, 1196 (Fed. Cir. 1992) (Third-party registrations found to be "persuasive evidence"). See also Sweats Fashions, Inc. v. Pannill Knitting Co., 833 F.2d 1560, 4 USPQ2d 1793, 1797 n.1 (Fed. Cir. 1987) ("Third-party registrations are admissible and competent to negate a claim of exclusive

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<sup>4</sup> The fourth registration (No. 1,247,851) for the mark CAJUN PLAY DE DO COCKTAIL for an alcoholic cocktail drink, with the terms "Cajun" and "Cocktail" disclaimed, was identified as cancelled on the printout.

rights in 'sweats' and the disclaimers are evidence, albeit not conclusive, of descriptiveness of the term"). Thus, the three active registrations in which the term "Cajun" is disclaimed or registered under the provisions of Section 2(f)<sup>5</sup> support the proposition that the term "Cajun" is not suggestive when it is used with alcoholic beverages and mixes.

Applicant argues (Brief at 2) that she "can see no difference between applicant's mark, CAJUN MARTINI, and any of the marks cited by the Examiner, each of which were registered on the Principal Register. A glaring example is CAJUN EGGNOG. What could be more descriptive of a Cajun flavor? Yet it was registered on the Principal Register." As noted above, the registration for CAJUN EGGNOG was registered under the provision of Section 2(f), which means that the applicant had admitted the mark was descriptive and then demonstrated that the mark had acquired distinctiveness and was thus entitled to registration on the Principal Register. The other registrations contain a disclaimer of the term "Cajun." Applicant has neither sought registration under the provisions of Section 2(f)

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<sup>5</sup> When an applicant seeks registration "under Section 2(f), the statute accepts a lack of inherent distinctiveness as an established fact." Yamaha Int'l Corp. v. Hoshino Gakki Co., 840 F.2d 1572, 6 USPQ2d 1001, 1005 (Fed. Cir. 1988).

nor disclaimed the term, which explains why the other terms were accepted for registration on the Principal Register while applicant's mark was refused registration.<sup>6</sup>

Having reviewed the evidence of record on the question of whether the term CAJUN MARTINI is merely descriptive for prepared alcoholic cocktails, we conclude that the term is merely descriptive. A "Cajun Martini" is a variation of a traditional martini prepared with a pepper-flavored vodka or gin or some other pepper flavor. Applicant's prepared alcoholic cocktails could include martinis with a similar pepper flavoring, and the mark is, therefore, merely descriptive of the goods.

Decision: The refusal to register is affirmed.

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<sup>6</sup> The only issue in this appeal is whether the mark CAJUN MARTINI is merely descriptive for the identified goods. Obviously, we do not address whether the term may be registrable under other circumstances.